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In the Supreme Court of the United States

October Term, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION,
a corporation,
Petitioner,

vs.

EL DORADO TERMINAL COMPANY,
a corporation,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

and

Brief in Support Thereof.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Supreme Court of the United States:

Your petitioner, General American Tank Car Corporation, respectfully prays that a writ of certiorari issue to review the judgment (R. 303, 339) of the United States Circuit Court of Appeals for the Ninth Circuit, entered on March 17, 1939, in a cause numbered and entitled on its docket, No. 8799, *El Dorado Terminal Company, a corporation, Appellant, v. General American Tank Car Corpora-*

tion, a corporation, Appellee, reversing a judgment of the United States District Court for the Northern District of California, Southern Division. Petition for rehearing was denied May 19, 1939 (R. 340, 341).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) THE ESSENTIAL ISSUE.

A single issue of federal law, arising under the Elkins Act, is presented in this cause, although certain subordinate issues, neither presented nor considered in the District Court, were raised for the first time in the opinions of the Circuit Court of Appeals. The essential question involved is whether a shipper, to whom railroad freight cars were leased by a car owning company, may, without violating the Elkins Act, recover from the car owner pursuant to the lease the full amount of the payments received by the car owner from the rail carriers for the use of the leased cars in interstate commerce when it appears that such payments exceed the amount of the shipper's car rental. Specifically the question is whether by such payment the shipper will secure the transportation of its property at a less rate than that named in the published freight tariffs. The Elkins Act provides

> "That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device what-

ever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination is practised." (32 Stat. 847, 34 Stat. 587-588; 49 U.S.C. § 41 (1); Appendix, pp. i, ii).

The material facts appear without controversy. In large measure they were set forth in a written stipulation (R. 45 et seq.).

(b) NATURE OF SUIT.

The cause arises out of a suit at law brought by respondent, El Dorado Terminal Company,[1] lessee of certain railroad tank cars from petitioner, General American Tank Car Corporation,[2] the owner and lessor of such cars, to recover from the Car Corporation pursuant to the lease certain moneys hereinafter styled "car mileage" received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the El Dorado Company in interstate commerce. The moneys sought to be recovered by the El Dorado Company constitute the excess of the "car mileage", so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the El Dorado Company for the leased cars. The defense was that the payment of such excess would violate the Elkins Act, in

(1) Respondent, El Dorado Terminal Company, is a wholly controlled subsidiary of its assignor, El Dorado Oil Works. For convenience respondent and its assignor are each, without distinction, referred to hereinafter as the "El Dorado Company".

(2) Referred to hereinafter as the "Car Corporation".

that thereby the El Dorado Company would indirectly secure the transportation of its property at less than the published freight rates. The judgment sought to be reviewed will require the Car Corporation to pay over to the El Dorado Company the excess of the car mileage above the car rental.

(c) CAR-LEASING AGREEMENT INVOLVED; PERFORMANCE THEREUNDER.

Prior to the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (July 2, 1934), hereinafter reviewed, the Car Corporation had entered into a written agreement with the El Dorado Company whereby it agreed for a term of three years commencing on January 1, 1934, to lease to the El Dorado Company certain tank cars for the shipment of the latter's products at a specified monthly rental for each car so leased (R. 20-28). It was further agreed that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass, the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service, and would credit the payments so collected to the car rental or service account of the El Dorado Company. (R. 26).

Throughout a period of approximately six months extending from January 1, 1934 to June 30, 1934, inclusive, it was the practice of the Car Corporation in the performance of its contract to credit the car rental account of the El Dorado Company with the full amount of the car mileage payments received by the Car Corporation from the rail carriers, even though they exceeded the car rental, and

to pay over the excess monthly to the El Dorado Company (R. 47-48). The Car Corporation felt compelled to modify its practice following the decision rendered by the Interstate Commerce Commission on July 2, 1934, in

Use of Privately Owned Refrigerator Cars, supra, (R. 49).

In this decision the Commission found and concluded, *inter alia,*

"Most of those who lease or rent cars derive monetary profits from the mileage earnings and thereby obtain transportation at less than the published rates." (R. 145.)

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act." (R. 151.)

"The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars." (R. 159.)

"* * * the payment in whole or in part to shippers * * * of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers gen-

erally who use cars furnished by the carriers and at less rates than the published rates; * * *." (R. 160.)

Pursuant to this decision, condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the El Dorado Company the car mileage in excess of the car rental. Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage payments to the El Dorado Company in amounts equal to the car rental but withheld payment of the excess. In an agreed statement of facts signed by the parties and received in evidence at the trial (R. 45, 48), it was stipulated, *inter alia*, that the Car Corporation's refusal to pay over this excess was based on its conclusion, upon advice of counsel, following the decision of the Commission referred to above, that such payment would be in violation of the Elkins Act.

The amounts by which the car mileage payments have exceeded the car rental are substantial. It is readily deducible from the ledger sheets reflecting the entire car rental account between the parties covering the period involved in the suit (plaintiff's Exhibit No. 1, R. 182, 183-187) that during the period of seventeen months extending from January, 1934, to May, 1935, both inclusive, the El Dorado Company's car rental amounted to $25,651.26. It is shown by the record stipulation (R. 45, 46) that the car mileage paid by the rail carriers on the leased cars for the same period aggregated $51,403.58. The car mileage earned by the cars was, therefore approximately twice the car

rental. Since the car rental provided by the contract was $27.50 to $30 per car per month (R. 23), the excess of the car mileage payments over the car rental was not less than an average of $27.50 per car per month.

The cars leased by the Car Corporation to the El Dorado Company were used in the transportation of the latter's shipments over the lines of common carriers by rail subject to the Elkins Act. Ninety-nine per cent or more of the shipments were interstate in character (Stipulation, R. 47).

(d) PROCEEDINGS IN COURTS BELOW.

The El Dorado Company brought suit seeking the recovery of the balance of the car mileage payments so withheld by the Car Corporation, amounting to $18,532.78. In defense, the Car Corporation pleaded that it was prohibited by law, and particularly by the Elkins Act, from paying over such excess car mileage revenue to the El Dorado Company, in that the El Dorado Company thereby

> "would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 18.)

A jury was waived. (R. 29.) The District Court sustained the Car Corporation's plea in defense. The Court concluded, *inter alia:*

> "That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in

excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 29, 35.)

Judgment was given accordingly for the Car Corporation. (R. 36-37.)

Upon appeal, the Circuit Court of Appeals reversed the judgment of the District Court, holding that the moneys so withheld should be paid over to the El Dorado Company (R. 339, 340).

OPINIONS OF THE COURTS BELOW.

The opinions of the Circuit Court of Appeals (R. 304-339; 341-348) are not yet reported. No opinion was rendered by the District Court. Its findings of fact, conclusions of law and judgment are in the record (R. 29-37).

STATEMENT OF BASIS OF JURISDICTION.

1. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C. § 347.

2. The judgment of the Circuit Court of Appeals, sought to be reviewed, was entered on March 17, 1939 (R. 303, 340). Petition for rehearing was seasonably filed and was denied May 19, 1939 (R. 340, 341).

STATUTES INVOLVED.

The case involves the construction and enforcement of the statute of the United States commonly known as the Elkins Act (32 Stat. 847, 34 Stat. 587; 49 U.S.C. § 41 (1) and (2)). The following provisions of the statute of the United States known as the Interstate Commerce Act are either collaterally involved or referred to in the opinion of the Circuit Court of Appeals: Section 1, par. 3, (41 Stat. 474, 49 U.S.C. §1 (3)); Section 1, par. 10, 11, 13 and 14 (41 Stat. 476, 49 U.S.C. § 1 (10), (11), (13) and (14)); Section 6, par. 1 (34 Stat. 586, 49 U.S.C. § 6 (1)); Section 15, par. 13 (36 Stat. 553, 49 U.S.C. § 15 (13)). Pertinent provisions of these statutes are reproduced in the Appendix (pp. i-v, infra).

QUESTIONS PRESENTED.

Whether the Circuit Court of Appeals erred:

1. In failing to hold that the owner of railroad freight cars leased to a shipper for the transporation of the latter's property in interstate commerce by railroad is prohibited by law, and particularly by the provisions of the Elkins Act, from paying over to the shipper any part of the car mileage payments received by the car owner from the rail carriers as compensation for the use of such cars, in excess of the shipper's car rental and other costs, if any, in that thereby the shipper would obtain a rebate or concession and an advantage or discrimination in respect to its shipments, in violation of the provisions of said Act.

(a) In holding that a "profit" obtained by a shipper-lessee of privately owned cars, represented by

the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, does not constitute a rebate prohibited by the Elkins Act.

(b) In holding that under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were payable to the shipper-lessee.

(c) In holding that a car owner, "as agent", is legally obligated to pay over to its principal, the shipper-lessee, and that the latter may lawfully receive, the full amount of the car mileage payments made by the rail carriers to the car owner, even though a "profit" is thereby realized by the shipper-lessee.

2. In holding that the car owner, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was required to plead and prove that such shipper had incurred no expense in addition to the car rental in connection with the use of the leased cars, and failed to sustain that burden.

3. In failing to hold that the full performance of the contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, and that for that reason the enforcement of the contract must yield to the enforcement of the Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(a) In holding that the Elkins Act is not violated through the payment by a car owner to a shipper of the full amount of the car mileage payments received by the car owner from the rail carriers for the use of cars in the transportation of the shipper's property in interstate commerce, notwithstanding that such car mileage payments may exceed the car rental and other expense incurred by the shipper in connection with the use of such cars, and in holding that the "profit" thereby obtained by the shipper-lessee "does not constitute a rebate prohibited by the Act", the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(b) In holding that, under the car mileage tariffs of the rail carriers, the car mileage allowances were payable to the shipper-lessee, although under the rules of the applicable tariffs shown of record (R. 191-198) such car mileage allowances were not payable to such shipper-lessee, the Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court holding that the rules contained in published tariffs may not be disregarded or ignored. (*Davis v. Henderson*, 266 U. S. 92, 93; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 637-8; *Davis v. Cornwell*, 264 U. S. 560, 562; *Erie R. R. Co. v. Stone*, 244 U. S. 332, 335-336; *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50.)

(c) In requiring the full performance of a contractual undertaking notwithstanding that such performance will produce results offending against the terms and purpose of

a federal statute, viz., the Elkins Act, the decision is in conflict on principle with applicable decisions of this Court. (*Armour Packing Co. v. U. S.*, 209 U. S. 56; *U. S. v. Union Stockyard & Transit Co.*, 226 U. S. 286.) The decision is also directly in conflict with the consensus of pertinent authority, represented by decisions of other federal courts and of the Interstate Commerce Commission. (*I. C. C. v. Reichmann*, 145 Fed. 235; *Spencer Kellogg & Sons v. U. S.*, 20 Fed.(2d) 459; *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323.)

(d) It is stated in the opinion of the Circuit Court of Appeals that the case is one of "novel impression" (R. 307). While it is petitioner's view that the issue here presented is controlled by decisions of this Court which are applicable in principle and which should have been followed, nevertheless, if the Circuit Court of Appeals is right in treating the case as one of first impression, a cogent additional reason is afforded for the exercise of the supervisory power of this Court. The Circuit Court of Appeals appears to anticipate a ruling by this Court, as evidenced by the following sentence of its opinion:

> "Whether under the new district court rules the complaint could be amended and a new trial had, we leave to the lower court, *if the Supreme Court should not agree with our decision on the Car Corporation's third contention*, which otherwise disposes of the case." (Emphasis supplied.) (R. 311.)

The "third contention" here referred to is the central issue in the case, viz., the validity of the defense pleaded under the Elkins Act. An authoritative determination of that

issue is of present and nationwide moment, lest erroneous doctrine find temporary and harmful acceptance.

The questions are of importance for the reason that, if the decision of the Circuit Court of Appeals shall become final, it will produce a reversion to subversive practices which the federal courts and the Interstate Commerce Commission alike have condemned as violative of the prohibitions of the Elkins Act. Specifically, it will sanction arrangements between car owning companies and shippers whereby the latter will become the lessees of privately owned cars under circumstances which will permit them to secure monetary profits through the use of the leased cars. Such monetary profits, derived from the mileage payments made by the carriers for the use of the privately owned cars so leased, will enable the shippers to obtain transportation of their property in interstate commerce at less than the published freight rates, in violation of the Elkins Act. The terms of the arrangements between the several car owning companies and the shippers may vary widely depending upon the exigencies of the car owners and the bargaining powers of the shippers, thereby resulting in undue preference and unjust discrimination between shippers, in violation of the Elkins Act. Privately owned cars will become authorized instruments of rebating, unjust discrimination and unlawful preference. The efforts of the Interstate Commerce Commission, as the administrative body charged with the enforcement of the provisions of the Interstate Commerce Act and the Elkins Act, to prevent unlawful rebating and discrimination will be largely frustrated.

Many thousands of privately owned cars are accepted and used by the rail carriers for the transportation of property in interstate commerce throughout the United States. Compensation is paid by the rail carriers for the private cars so employed. In view of the conflicting interpretations of the Elkins Act by the Circuit Court of Appeals and the Interstate Commerce Commission, respectively, and of the duties of your petitioner and the respondent thereunder, it is important that rail carriers, car owners and shippers be authoritatively advised by a decision of this Court as to the terms, respecting compensation, under which such privately owned cars may be used for the transportation of property in interstate commerce. In its practical effect, the decision of the Circuit Court of Appeals reverses the decision reached by the Commission in the course of its efforts to eliminate unlawful practices in the use of private cars. It should be determined, therefore, whether the conclusions and admonitions of the Commission are to be heeded by car owning companies and their shipper-lessees, in view of possible prosecutions for violation of the Act, or whether they may safely be disregarded in reliance upon the contrary conclusions of the Circuit Court of Appeals. In particular it is important that it be authoritatively decided

(1) Whether a shipper-lessee may receive, through a car owner or otherwise, the full amount of the car mileage payments made by the rail carriers for the use of such cars, even though such car mileage payments are in excess of the car rental and other costs, if any, incurred by the shipper-lessee in connection with the employment of such cars;

(2) Whether a profit received by a shipper-lessee, represented by the excess of car mileage payments made by the rail carriers, for the use of privately owned cars, above the car rental and other expense incurred by such shipper-lessee under lease or other arrangement with a car owner, is a rebate or concession prohibited by the Elkins Act.

This Court has repeatedly declared that private contract rights must yield to the public welfare where the latter is appropriately declared and the two conflict. In particular this Court has refused to require or permit the performance of a contractual obligation which offends against the provisions of the Elkins Act (*Armour Packing Co. v. U. S., supra; U. S. v. Union Stockyard & Transit Co., supra*). In disregard of these principles, the decision here sought to be reviewed would enforce private contract rights which conflict with the prohibitions of the Elkins Act.

The novel and erroneous rule laid down by the Circuit Court of Appeals should not be permitted to stand as a guide for the future.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket No. 8799, *El Dorado Terminal Company, a corporation, Appellant, v. General American Tank Car Corporation, a corporation, Appellee*, and that the said judgment of the Circuit Court of Appeals

for the Ninth Circuit may be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

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Respondent.

Brief in Support of Petition for Writ of Certiorari.

References to the opinions below are supplied in the Petition (p. 8).

A statement of the case has been given in the Petition (pp. 2-8) and to avoid duplication is not repeated.

SPECIFICATIONS OF ERROR.

The errors intended to be urged are those specified in the accompanying Petition and numbered 1 to 3 inclusive (pp. 9-10), the same being assigned as errors.

SUMMARY OF ARGUMENT.

1. The owner of railroad freight cars leased to a shipper for the transporation of the latter's property in interstate commerce by railroad is prohibited by law, and particularly by the provisions of the Elkins Act, from paying over to the shipper any part of the car mileage payments received by the car owner from the rail carriers as compensation for the use of such cars, in excess of the shipper's car rental and other costs, if any, in that thereby the shipper would obtain a rebate or concession and an advantage or discrimination in respect to its shipments, in violation of the provisions of said Act.

(a) A "profit" obtained by a shipper-lessee of privately owned cars, represented by the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, constitutes a rebate prohibited by the Elkins Act.

(b) Under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were not payable to the shipper-lessee.

(c) A car owner, "as agent", is not legally permitted to pay over to a shipper-lessee, as principal, and the latter may not lawfully receive, the full amount of the car mileage payments made by the rail carriers to the car owner, when a "profit" is thereby realized by the shipper-lessee.

2. The car owner, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the

shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was not required to plead and prove that such shipper had incurred no expense in addition to the car rental in connection with the use of the leased cars. The burden was in any event sustained.

3. When the full performance of a contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, the enforcement of the contract must yield to the enforcement of the Act.

ARGUMENT.

I.

THE OWNER OF RAILROAD FREIGHT CARS LEASED TO A SHIPPER FOR THE TRANSPORTATION OF THE LATTER'S PROPERTY IN INTERSTATE COMMERCE BY RAILROAD IS PROHIBITED BY LAW, AND PARTICULARLY BY THE PROVISIONS OF THE ELKINS ACT, FROM PAYING OVER TO THE SHIPPER ANY PART OF THE CAR MILEAGE PAYMENTS RECEIVED BY THE CAR OWNER FROM THE RAIL CARRIERS AS COMPENSATION FOR THE USE OF SUCH CARS, IN EXCESS OF THE SHIPPER'S CAR RENTAL AND OTHER COSTS, IF ANY, IN THAT THEREBY THE SHIPPER WOULD OBTAIN A REBATE OR CONCESSION AND AN ADVANTAGE OR DISCRIMINATION IN RESPECT TO ITS SHIPMENTS, IN VIOLATION OF THE PROVISIONS OF SAID ACT.

A. The Shipper's "Profit" as a Rebate.

The holding of the Circuit Court of Appeals to which the petitioner's challenge is particularly directed is cast in the following terms:

"(3) The Elkins Act makes it a criminal offense for the railways to pay less than their established mileage rates for the cars supplied by the El Dorado Company. The mileage rates properly are based upon averages which assume that certain shippers-suppliers having lower costs will make a profit. *Such profit does not constitute a rebate prohibited by the Act.*" (Opinion, R. 311) (Emphasis supplied.)

This declaration is without precedent or counterpart in the history of common carrier regulation. It is hostile to ruling principles repeatedly announced and enforced. In its specific application to the use of privately owned cars, it is opposed to every other ruling within petitioner's knowledge. Never heretofore has it been held or implied that a shipper, by becoming a lessee of privately owned cars, may lawfully enjoy a "profit" represented by the excess of the car mileage revenue over the costs incurred by the shipper in obtaining and using the cars.[1]

It has been noted in the Petition (p. 10, supra) that the Circuit Court of Appeals further held that the Car Corporation failed to prove that the El Dorado Company

(1) The court has erred in its premises as well as in its declaration of principle. As shown hereafter, under "B" of this subdivision, failure of the rail carriers to pay the car mileage earnings to the El Dorado Company would not be "a criminal offense" under the Elkins Act, since under the provisions of the car mileage tariffs the mileage earnings were not payable to the El Dorado Company. Moreover, the car mileage rates are not based upon average costs of "shipper-suppliers," as understood by the court. They are based wholly upon the costs of *car owners*, and in no part upon the costs of lessees of such cars. (*In the Matter of Private Cars*, 50 I.C.C. 652, 682).

had incurred no costs, additional to rental, in the use of leased cars. That conclusion will be separately considered hereafter. But the ruling immediately criticized is without limit or qualification. It goes the full length of declaring that irrespective of the shipper's costs, and alike irrespective of the "profit" measured by the excess of the car mileage payments above costs, such "profit" rightly inures to the shipper as the legitimate fruit of his favorable lease. According to the court, it is not to be viewed as an indirect rebate or concession.

The cases heretofore decided on similar or cognate issues have reached directly contrary results.

(1) Use of private car as a means of rebating or discrimination.

As recited in the preceding Petition (pp. 4-5), the Car Corporation regularly credited the El Dorado Company with the full amount of the car mileage received from the rail carriers for the use of the leased cars, and paid over the excess of such receipts above the car rental, until the announcement of the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (July 2, 1934). In view of the conclusions reached by the Commission in that case, plainly admonishing shippers, car owners and carriers alike as to the requirements of law, the Car Corporation modified its practice under the agreement of lease. Thereafter it credited the El Dorado Company with the car mileage payments in amounts equal to but not exceeding the car rental, deeming that to pay over the excess would subject both parties to charges of violation of the Elkins Act (Stipulation R. 45, 48). The El Dorado Company still

paid no car rental in fact, since its rental was offset by the credit of car mileage in equal amount (R. 172).

Throughout the greater part of its existence the Commission has been gravely concerned by reason of the persistence of rebating and discrimination in connection with the use of privately owned cars.[1] In its annual report for the year 1906 (p. 48) the Commission commented with satisfaction upon the decision of the United States Circuit Court in *I. C. C. v. Reichmann*, 145 Fed. 235, holding that a private car company which furnishes its cars to the rail carriers for the use of shippers "is within the provisions of the Elkins Law." Further summarizing this decision the Commission said:

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(1) The Commission's annual reports to Congress, commencing with its Third Annual Report for the year 1889, clearly disclose its continuing concern with the private car problem (Third Annual Report for 1889, pp. 18, 108; Seventh Annual Report for 1893, pp. 60-67; Seventeenth Annual Report for 1903, pp. 22-26; Nineteenth Annual Report for 1905, pp. 10, 11; Twentieth Annual Report for 1906, p. 48). In its annual report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66). In its annual report for the year 1903 the Commission again emphasized the "*Evils Resulting from the Use of Private Cars*" (p. 22 et seq.). Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia*:

> "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, *a practice which operated to the same effect as the payment of rebates to such shippers* * * *". (p. 24.) (Emphasis supplied.)

"The giving by such a car company of any rebate to a shipper using its cars is a violation of such statute. Such a car company is therefore subject to the jurisdiction of this Commission when inquiring into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates. (145 Fed. Rep. 235)".

The efforts of the Commission to eliminate improper and wasteful practices in the use of privately owned cars culminated in a general investigation, nation-wide in scope, instituted on the Commission's own motion on July 6, 1931. Part V of this investigation (Ex Parte No. 104) was directed specifically to "Private Freight Cars" (R. 55). For the purpose of hearing and investigation the proceeding was consolidated, so far as it related to refrigerator cars, with an Investigation and Suspension proceeding (Docket No. 3887) entitled *"Use of Privately Owned Refrigerator Cars"* (R. 49, 55). The extended hearings and investigations thereupon conducted by the Commission eventuated in the report and decision which brought about the change in practice on the part of the Car Corporation in the matter of the payment of car mileage to the El Dorado Company.

The complete text of the Commission's report and order is in the record, by stipulation of the parties (R. 48, 49-162). It is in the record not only for the Commission's conclusions as to the requirements of law, but also for the findings of fact which served as the foundation for those conclusions. The following excerpts from the Commission's report exemplify the prevailing practices as well as their objectionable consequences and serve also to re-

veal the cogent reasons which led the Commission to condemn the payment of car mileage allowances to shippers in excess of car rental and any incidental expense:

> "The terms on which refrigerator cars are let to shippers vary. Some lessees pay a fixed monthly rental, have their reporting marks on the cars, and the mileage earnings are paid directly to them. Some pay a fixed monthly rental, but the cars bear the reporting marks of the lessors, who collect the mileage earnings and in turn remit same to the lessees. Both forms of contract are hereinafter referred to as leases. Some shippers have cars assigned exclusively to their service that carry reporting marks of the owners. The mileage earnings are paid to such owners. If such earnings exceed a specified amount, the excess is paid to the shippers." (R. 59)

> "The competition is keen, resulting in the cutting of rentals and intensive solicitation of shippers. The most fertile field is shippers who have a fairly regular volume of traffic the year round, such as dealers in dairy products, canned goods, and candy. By leasing or renting only enough cars to take care of their assured traffic, leaving the carriers to furnish cars to move the remainder, they are able to keep their cars moving most of the time, and *the mileage earnings usually exceed the compensation paid the car owners by substantial amounts.*" (R. 60) (Emphasis supplied.)

In its findings and conclusions the Commission said, *inter alia*:

> "We further find * * * that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through

car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates; * * *" (R. 160)

The Commission said further:

"The discussion herein has been confined almost entirely to refrigerator cars, and the findings will be so restricted, but *the general principles enunciated apply equally to all other types of private cars.*" (R. 159) (Emphasis supplied.)

The significance and importance of the Commission's conclusions are obvious. Plainly the Car Corporation could not ignore these declarations except at the peril of disciplinary action at the instance of the Commission.[1] It undertook to bring its practices into conformity with the requirements of law as declared by the Commission. One private car owning company disregarded the admonitions of the Commission and was indicted for violation of the Elkins Act by reason of an arrangement whereby a shipper-lessee received car mileage in excess of its car rental.

U. S. v. North Western Refrigerator Line Co., U. S. D. C. Northern Dist. of Ill. No. 29048; indictment returned June 13, 1935.

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(1) It is stated in the opinion of the Circuit Court of Appeals that "The Car Corporation relies on a statement of the Commission in the Refrigerator Car case * * *". (R. 327) This statement is inadequate. It has been made plain throughout that the Car Corporation relies upon all of the pertinent findings and conclusions of the Commission in that case.

The brief of the United States Government in opposition to defendant's demurrer and motion to quash in the latter case was brought to the attention of the Circuit Court of Appeals. It is this brief to which the court refers curtly in its opinion as "the brief of a district attorney on a demurrer to an indictment" (R. 326).

The statement of the Commission that the principles set forth in its report are applicable to "all other types of private cars" is dismissed by the Circuit Court of Appeals as "dictum" (R. 344). If such characterization is technically warranted, it should at least be recognized that the admonitions of an experienced administrative body charged with the enforcement of the Elkins Act and related statutes are persuasive and worthy of respect. The Circuit Court of Appeals has given them no weight whatever.

The conclusions of the Circuit Court of Appeals are wholly irreconcilable with the conclusions of the Commission. In effect the Court has overruled the Commission. If the decision is permitted to stand it will not only discredit the Commission's views but it may well nullify the Commission's efforts to put an end to rebating and discrimination in connection with the use of privately owned cars.

In the course of its report in *Use of Privately Owned Refrigerator Cars* the Commission cited and relied upon the decision of the United States Circuit Court in

Interstate Commerce Commission v. Reichmann, supra, (R. 151-154).

In that case issue was raised as to the legality of arrangements between a car owner and shippers whereby

the shippers received part of the car mileage payments made by the rail carriers to the car owner as compensation for the use of the cars. The Circuit Court there held that the prohibitions of the Elkins Act extend to "any person, persons or corporation," thereby embracing private car owning companies, and that the payment of car mileage revenue by the car owner to the shipper would violate the Elkins Act in that it "would operate to give the fortunate payee an advantage by reducing his freight account below the regular rate * * *" (pp. 240-241). The court said further that "The net cost of the transaction to him—his freight expense—has been reduced just that much" (p. 237).

(2) Principle unaffected by 1906 and 1917 amendments.

The Circuit Court of Appeals in the instant cause concludes that the ruling in the *Reichmann* case is no longer applicable for the reason that the case "was decided in 1906, shortly before the Hepburn amendment and 11 years before the car service amendment of 1917 * * *" (R. 326). But the court is in error as to the effect of both amendments. By the 1906 amendment to Section 15 of the Interstate Commerce Act (Hepburn Amendment) it is provided in brief that "*If*" the owner of property furnishes any instrument of transportation "the charge and allowance therefor shall be no more than is just and reasonable" and the Commission is empowered to "determine what is a reasonable charge as the maximum to be paid by the carrier or carriers * * * and fix the same by appropriate order * * *". (34 Stat. 590, 36 Stat. 553-554; 49 U.S.C. §15(13); Appendix p. v.) Such was the sole purpose of the amendment. It was wholly restrictive. The amend-

ment has not conferred upon shippers the right "to supply their carriers with the facilities necessary for the transportation of their products," as the Circuit Court of Appeals has erroneously concluded (R. 312, 326). The carriers still retain the right to furnish their own vehicles for the transportation of freight.

Atchison, Topeka & Santa Fe Ry. Co. v. U. S., 232 U. S. 199, 214, 215.

The Car-Service Amendment of 1917 (40 Stat. 101, 41 Stat. 476; 49 U.S.C. §1(10), (11), (13) and (14); Appendix pp. iii, iv) served to broaden the authority of the Commission, but it had neither the purpose nor effect suggested in the opinion of the Circuit Court of Appeals. In particular it did not give the Commission authority over the rates of compensation paid by the carriers to *all* "car-suppliers". In a very recent decision in I. & S. Docket No. 4572, *Refrigerator Car Mileage Allowances* (decided April 27, 1939), the Commission has held that this amendment confers jurisdiction over practices in respect to car service "as between the carriers only".

Neither the 1906 nor the 1917 amendment served to legalize any practice which theretofore had been held to be in violation of the Elkins Act. It remained and still remains the law that a privately owned car may be used, with the carrier's consent, in interstate commerce, but it may not be used as a means of rebating, discrimination or preference.[1]

(1) The Circuit Court of Appeals seeks further to distinguish the *Reichmann* case on the ground that "Though purporting to construe the Elkins Act, it does not consider

(3) Rebates or concessions through intervening third persons.

The Commission also cited and relied upon the decision of the Circuit Court of Appeals for the Second Circuit in

Spencer Kellogg & Sons v. U. S., 20 Fed.(2d) 459, certiorari denied 275 U. S. 566. (R. 155)

There a rebate or concession was accomplished through the payment by an elevator company to a shipper of a portion of the allowance made by the rail carrier for the elevation of grain in transit from water to rail. The payment was held to be in violation of the Elkins Act, irrespective of the fact that the elevator company was not a common carrier but an intervening third person.

The service of elevation in transit and the provision of private cars are comprehended by a single sentence of Section 1 of the Interstate Commerce Act, which provides that the term "transportation" shall include "cars, and other vehicles * * * irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit * * * of property transported." (24 Stat. 379, 41 Stat. 474-475; 49 U.S.C. §1(3); Appendix p. ii.)

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its second paragraph, making criminal a carrier's deviation from such tariffs, perhaps because no such car supplying tariff was in existence." (R. 326-7) (For 2d par. of Elkins Act, see Appendix, p. ii.) In reply it will suffice to observe that no deviation from the car mileage tariffs is involved in the instant case. The car mileage was not payable to the El Dorado Company under the provisions of the carriers' published tariffs, as is shown under "B" of this subdivision.

The two cases just reviewed are indistinguishable on principle from the instant case. The cases are in parallel in all essential features. In each instance an intermediary is the means through which a shipper obtains a payment which in effect reduces his transportation charges. A single governing principle is involved, and that principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device, to defeat tariff rates or to obtain an advantage.

B. Circuit Court's Erroneous Understanding of Car Mileage Tariffs

This suit was not brought to enforce the provisions of the rail carriers' car mileage tariffs. Rather it is a suit to recover upon a contract between a shipper and a car owning company. Nevertheless, the Circuit Court of Appeals has given extended consideration to the car mileage tariffs and has rested its decision largely upon a mistaken understanding of the tariff provisions and their effect. It has upheld the shipper's right of recovery primarily upon the ground that under the applicable tariffs of the rail carriers the car mileage allowances were payable to such shipper (R. 329).[1] The tariff provisions are in the record and do not so provide (R. 191-198).

The error of the court in interpreting the tariffs and purporting to enforce them was drawn to its attention in the petition for rehearing. Thereupon the court de-

(1) In this connection the court devoted a substantial portion of its opinion to the thesis that it would be a crime under the second paragraph of the Elkins Act (Appendix, p. ii) for the rail carriers to refuse payment of car mileage in conformity with the provisions of the published tariffs (R. 311, 323, 324, 328).

clared, in its supplementary opinion, that "*we must assume* that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (R. 346). (Emphasis supplied.) Such assumption is not only without justification of record but is contrary to the record.

The applicable rules of the car mileage tariffs setting forth the terms and conditions upon which the mileage allowances would be paid are in the record as plaintiff's Exhibit No. 3 (R. 191-198) and are specifically identified by stipulation of counsel (R. 191).[1] Throughout the first fifteen months of the period covered by the suit, these tariff rules provided that the car mileage allowances would be paid to the car owner or to the party who had acquired the cars "as shown by the permanent reporting marks" (R. 192-197). The "reporting marks" borne by the leased cars were *not* those of the El Dorado Company, but were those of the Car Corporation (R. 21). Moreover, commencing with April 1, 1935, and therefore effective during the last two months of the period in suit, the tariff rules contained a restrictive clause forbidding payment to a lessee such as the El Dorado Company. The clause reads:

> "Mileage for the use of cars of private ownership will be paid for loaded and empty movements *only to the car owner—not to a lessee* * * *" (R. 197). (Emphasis supplied.)

The meaning of these words is not open to controversy.

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(1) In its assignment of errors the El Dorado Company identified these rules as the "applicable published railroad tariffs" (R. 225, 235).

The Circuit Court of Appeals has erroneously understood that these tariff rules are merely "rules" of the American Railway Association (R. 347). The court has failed to understand that these "*Association* rules" are the *actual tariff rules* published and filed with the Commission in behalf of all the rail carriers by "American Railway Association Tariff Bureau, B. T. Jones, Agent" (R. 192). In holding that under the applicable tariffs the car mileage allowances were payable to the El Dorado Company, the Circuit Court of Appeals has in fact disregarded the provisions of these applicable tariffs specifically governing the payment of the car mileage allowances. Its decision is in conflict with decisions of this Court which have uniformly held that the rules contained in the published tariffs may not be disregarded or ignored. (*Davis v. Henderson*, 266 U. S. 92, 93; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 637-638; *Davis v. Cornwell*, 264 U. S. 560, 562; *Erie R. R. Co. v. Stone*, 244 U. S. 332, 335-336; and see *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50.)[1]

C. Respondent's "Agency" Theory.

Counsel for the El Dorado Company evolved a theory of "agency" to implement the demand for payment of the car mileage revenue in full. The contention is that

(1) In the opinion upon petition for rehearing the court for the first time criticizes the answer of the Car Corporation because it "does not allege the *absence* of a tariff compensating the El Dorado Company" (R. 346). (Emphasis supplied). This criticism seems especially unwarranted since the parties *stipulated* as to the applicable tariffs.

the Car Corporation made itself the "agent" for the collection of the car mileage revenue for its principal the El Dorado Company, and hence that it must pay over the car mileage revenue in full to the El Dorado Company. This theory was adopted by the Circuit Court of Appeals (R. 304, 305, 306).

We think that agency relations were not created, but, if it is to be assumed that an agency did arise, it can contribute nothing to the case for the El Dorado Company. Manifestly, a principal can recover through his agent only that which is lawfully payable to the principal. In the preceding subdivision it has been shown that, under the provisions of the applicable car mileage tariffs, the car mileage revenue was not payable to the El Dorado Company. Hence the El Dorado Company could not recover the revenue upon the theory of agency.

The argument is beside the point in any event. If it were possible to conceive of an agency agreement whereby a shipper is to obtain, through an intervening car owning company, payments from the rail carriers amounting to a partial remission of freight charges, the agreement would be unenforceable. It is obvious that, if the rule were otherwise, the statute could readily be circumvented by the convenient device of designating the car owning companies as the "Agents" through whom car mileage payments could be made to the shippers in violation of the published freight rates and the purposes of the law.

The Elkins Act is a remedial statute which broadly comprehends all manner of arrangements, direct or indirect, whereby property is "transported at a less rate

than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced." (*U. S. v. Koenig Coal Co.*, 270 U. S. 512, 518, 519).

The means employed is immaterial. The device may "not be necessarily fraudulent". Unlawful intent is not a necessary ingredient of the offense. (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 71, 72).

The decision in the instant case stands alone in upholding practices which in fact result in the transportation of property at less than the lawfully established tariff freight rates, constituting rebating, and in addition will inevitably result in inequalities and preferences among shippers.

II.

THE CAR OWNER, DEFENDING ITS REFUSAL TO PAY OVER TO A SHIPPER-LESSEE THE EXCESS OF THE CAR MILEAGE PAYMENTS RECEIVED FROM THE RAIL CARRIERS ABOVE THE AMOUNT OF THE SHIPPER'S CAR RENTAL UPON THE GROUND THAT THE PAYMENT OF SUCH EXCESS WOULD VIOLATE THE ELKINS ACT, WAS NOT REQUIRED TO PLEAD AND PROVE THAT SUCH SHIPPER HAD INCURRED NO EXPENSE IN ADDITION TO THE CAR RENTAL IN CONNECTION WITH THE USE OF THE LEASED CARS. THE BURDEN WAS IN ANY EVENT SUSTAINED.

Although the point was neither raised nor presented either in the District Court or upon appeal, the Circuit Court of Appeals has held that the burden was upon the Car Corporation to prove that the El Dorado Company

had incurred no expense, additional to the car rental, in connection with the use of the leased cars. It has further held that that burden was not discharged. (R. 308, 311). In its opinion upon petition for rehearing the court has suggested, for the first time, that defendant's pleading was inadequate in this regard. (R. 343-345.) Neither point was properly before the court for decision.

A. Theory of Decision at Variance With Theory Upon Which Case Was Tried and Decided. Assumption of Facts Not in Evidence.

The record reveals no costs or expenses, other than car rental, incurred by the El Dorado Company in connection with the use of the cars. The entire account between the parties is in evidence as plaintiff's Exhibit No. 1 and shows no debits to the El Dorado Company other than car rental (R. 182, 183-187, inclusive). The stipulation as to facts is silent respecting any other costs or expense (R. 45). Neither in its proposed findings (R. 203-206, inclusive) nor in its assignment of errors (R. 225-286, inclusive) has the El Dorado Company advanced any claim that cost or expense in addition to the car rental was incurred. In fact, both parties presented the case in the District Court as well as in the Circuit Court of Appeals upon the basis that the car rental was the only cost to the El Dorado Company. The case was decided by the District Court upon that basis. Under well settled principles the parties could not, and they did not, adopt a different theory of the case in the Circuit Court of Appeals. Neither party will be heard in an appellate court to question facts whose existence was assumed without objection in the trial court and on which assump-

tion the trial court proceeded without objection in deciding the case. *U. S. v. Atkinson*, 297 U. S. 157, 159-160; *General Utilities Co. v. Helvering*, 296 U. S. 200, 206-207; *McCandless v. Furland*, 293 U. S. 67, 74; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 306; *Brown v. Gurney*, 201 U. S. 184, 190; *Panama City v. Federal Reserve Bank of Atlanta*, (C. C. A. 5th) 97 Fed.(2d) 499, 500; *Boray v. Fuller*, (C. C. A. 8th) 63 Fed.(2d) 280, 284; *Sacramento Suburban Fruit Lands Co. v. Melin*, (C. C. A. 9th) 36 Fed.(2d) 907, 909; *Arkansas Anthracite Coal & Land Co. v. Stokes* (C. C. A. 8th) 2 Fed.(2d) 511, 515.)

No issue as to additional costs, either actual or conjectural, was ever suggested until the Circuit Court of Appeals, upon its own initiative, raised it in its opinion (R. 308). The court, and not the El Dorado Company, tenders the suggestion that the monthly rentals did not establish the El Dorado Company's costs. The court, and not the El Dorado Company, argues that the Car Corporation had the burden of proof and failed to meet it. In support of its conclusion that the car rental did not establish the El Dorado Company's costs, the court offers a purely speculative analysis of costs and "possible liabilities" to which the El Dorado Company might have been subject (R. 310). None of these hypothetical costs has record support and in some important respects they are demonstrably contrary to fact.[1]

(1) For example: (1) The court assumes that the El Dorado Company "must provide trackage facilities" for the storage and switching of the cars (R. 310). This is without support in the contract or otherwise in the record. (2) The court says that the El Dorado Company "has the current cost of their administration" (i. e., of the cars)

If a party may not upon appeal change its theory of the case, it must logically follow that the Circuit Court of Appeals is not free to formulate a new theory of the case, and, in doing so, to assume a state of facts for which there is no support in the record. This must particularly be so where the court proceeds to assume facts which are at variance with what was presented to the trial court. The fact is that the Circuit Court of Appeals has here reversed the trial court on a point not ruled upon or submitted for ruling, or even assigned as error. It is wholly unfair to the District Court to hold it guilty of error in a

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(R. 310). If this is a reference to maintenance and repairs, it will suffice to point out that the Car Corporation is expressly obligated by the contract to maintain and repair the cars (R. 24-25). (3) The court states that the El Dorado Company "has the cost of cleaning the cars" (R. 310). The record does not so indicate. (4) The court says, contrary to the fact, that the cocoanut oil is "both inflammable and explosive and the contents may destroy the cars" (R. 310). (5) The court raises the possibility that the plant might suspend operation during the remainder of the lease so that the "rental costs for supplying the cars for 18 months may be the total 36 month obligation under the lease" (R. 311). Yet testimony given by an officer of the El Dorado Company at the trial, two months before the expiration of the lease, was to the effect that since the middle of 1934 the Car Corporation had continued to credit the El Dorado Company with a sufficient amount of the mileage earnings to offset all rental costs (R. 172).

A purely conjectural analysis of "possible" costs and liabilities of this variety, many of which are directly contrary to the record, is patently unwarranted.

ruling which it never made.[1] (*Commercial National Bank v. Rebèr*, (C. C. A. 3rd) 74 Fed.(2d) 301, 302.)

B. The Car Corporation's Burden of Proof Fully Discharged.

The record shows that the car mileage earnings were more than double the car rental during the period from January 1, 1934, to May 31, 1935, inclusive, the excess amounting to more than $25,000 (Statement of facts, Petition, page 6). While the record does not show the amount by which the mileage earnings exceeded the rental during the remainder of the three-year period covered by the lease, it does show that at the time of the trial, two months before the expiration of the lease, the Car Corporation, although retaining the excess mileage earnings, had since "the middle of the year 1934" credited to the rental account of the El Dorado Company "such proceeds of the mileage earnings as were equal to the rental", so that the El Dorado Company had actually paid nothing by way of rental during the entire period of the lease up to the time of trial (R. 172).[2] The record also shows that the cost of maintenance and repair of the cars was to be borne by the Car Corporation and not by the El Dorado Company (R. 24, 177). The only reasonable in-

(1) In *McCandless v. Furlaud*, supra, it was held that the circuit court of appeals had erred in reversing a judgment upon a point which, although assigned as error, had not been presented to the trial court. This Court said:

> "The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court." (293 U.S. at p. 74.)

(2) This testimony was overlooked by the Circuit Court of Appeals. See subd. (5) of Note (1), supra, pp. 36-37.

ference to be drawn from these facts in the absence of any other evidence is that the car mileage earnings were substantially in excess of the car rental and any other "actual expenses" which might conceivably have been incurred by the El Dorado Company and that the payment of this excess to the El Dorado Company, therefore, would accomplish an unlawful rebate.

The payment by a car owner to a shipper-lessee of car mileage earnings so greatly in excess of car rental cannot be justified upon the merely speculative assumption that the lessee might have incurred, or might in the future incur, additional costs equal to the amount of such earnings. Even in a criminal prosecution for unlawful rebating in violation of the Elkins Act, the government is not required to offer proof excluding possibilities of such a remote character. (*Vandalia R. Co. v. U. S.*, (C. C. A. 7th) 226 Fed. 713, 717; certiorari denied, 239 U. S. 642.) Yet such is the burden which the views expressed in the opinion of the Circuit Court of Appeals would impose upon the Car Corporation.

If the El Dorado Company had incurred any costs or expense additional to car rental, the facts were within its knowledge. They were not within the knowledge of the Car Corporation. In such a case, where there is proof of circumstances tending to support the contention of the party having the burden of proof, the other party, who is in a position to offer evidence of all the facts and circumstances as they existed, must produce such evidence. If he fails to do so, it must be concluded that the facts do not support his cause. (*Selma, Rome & Dalton R. R. Co. v. U. S.*, 139 U. S. 560, 567-568; *Graves v. U. S.*,

150 U. S. 118, 120-121; *Runkle v. Burnham*, 153 U. S. 216, 225; *U. S. v. Denver & R. G. R. R. Co.*, 191 U. S. 84, 91-93; *Henderson v. Richardson Co.*, (C. C. A. 4th) 25 Fed. (2d) 225, 228; *American Lead Pencil Co. v. Gottlieb & Sons*, 181 Fed. 178, 181; *Kyle v. Wadley*, 24 F. Supp. 884, 886.) Since the El Dorado Company offered neither claim nor proof of any additional costs, the Circuit Court of Appeals erred in concluding that the Car Corporation failed to sustain its burden of proof.

C. Defense Adequately Pleaded.

The adequacy of petitioner's plea in defense, based upon the Elkins Act, was likewise at no time questioned by the El Dorado Company either in the trial court or upon appeal. Upon its own initiative the Circuit Court of Appeals has questioned the adequacy of the plea, and has done so only in its opinion upon petition for rehearing (R. 344). Even if the court could properly initiate this point, it is plain that the plea was adequate. This Court has held that even in an indictment under the Elkins Act it is sufficient to plead the offense in the language of the statute and that such pleading is good, at least in the absence of demurrer (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 83-84; and see *U. S. v. Chicago St. P. and O. Ry. Co.*, 151 Fed. 84, 86, aff'd 162 Fed. 835, cert. den. 212 U. S. 579).

In pleading its defense the Car Corporation averred that if it should pay over to the El Dorado Company "any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agree-

ment, such credit and payment would be unlawful *in that* * * * (the El Dorado Company) * * * *would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation,*[1] thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act" (R. 18). (Emphasis supplied.) This served fully to acquaint the adversary and the court with the nature of the defense relied upon.

The plea of the Car Corporation thus properly set forth the ultimate fact that, by the payment of any part of the excess car mileage earnings, the El Dorado Company would secure transportation of its property at less than the tariff rates.

III.

WHEN THE PERFORMANCE OF A CONTRACTUAL UNDERTAKING IS FOUND TO BE IN CONFLICT WITH THE ELKINS ACT, THE ENFORCEMENT OF THE CONTRACT MUST YIELD TO THE ENFORCEMENT OF THE ACT.

It is elementary that a contractual obligation will not be enforced by the courts if thereby the law would be violated. (*Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, 375; *Hudson County Water Company v. McCarter*, 209 U. S. 349, 357.)

It has been made particularly clear by this Court that when the provisions of a contract offend against the

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(1) While the Circuit Court of Appeals in its opinion upon petition for rehearing sets forth a part of the Car Corporation's plea, it has omitted that portion which is italicized above (R. 344).

terms and purpose of the Elkins Act, the enforcement of the contract should be enjoined.

United States v. Union Stockyard & Transit Co., 226 U. S. 286, 309.

(See also *New York, New Haven & Hartford R. R. v. I. C. C.*, 200 U. S. 361, 402; *Armour Packing Co. v. U. S.*, 209 U. S. 56, 81-82; *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 474.)

The effect of the decision of the Circuit Court of Appeals in the instant cause is to enforce a contractual undertaking on the part of a car owning company to a shipper-lessee notwithstanding that the shipper-lessee will thereby secure a "monetary profit" from the employment of the cars in the transportation of its property and that such monetary profit is a *pro tanto* abatement or remission of the shipper's freight charges. While in words the Circuit Court of Appeals does not so declare, such are the necessary consequences of its ruling.

By its decision herein the Circuit Court of Appeals would set no limits upon the results that may be accomplished by contract between a car owning company and a shipper-lessee. The parties may bargain freely as to the amount of the car rental, and with equal freedom as to the disposition of the car mileage payments made by the rail carriers to the car owning company. The resulting profits may be large or small, and they may vary widely as between shippers. Whatever the measure of profit, and however diverse the treatment meted out to different shippers, this decision would require performance in accordance with the strict letter of each con-

tract. Thereby the decision would reverse the rule of law which has heretofore prevailed, and require the statute to yield to the contract.

CONCLUSION.

The decision of the Circuit Court of Appeals herein is opposed to the entire current of authority. It presents a dangerous conflict with the conclusions maturely reached by the Interstate Commerce Commission as a result of its extensive investigation in *Use of Privately Owned Refrigerator Cars, supra.* If allowed to stand as an authoritative expression of the law, it will afford judicial sanction to the use of privately owned cars as a means by which shippers may avoid the prohibitions of the Elkins Act against rebates, concessions, preference and discrimination.

Respectfully submitted,

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(APPENDIX FOLLOWS)

Appendix

STATUTORY PROVISIONS INVOLVED.

Elkins Act, § 1, par. 1 and 2:

"That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two

years, or both such fine and imprisonment, in the discretion of the court. * * * ".

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, 32 Stat. 847, c. 708, as amended by Act of June 29, 1906, 34 Stat. 587, c. 3591; 49 U. S. C. § 41(1) and (2).

Interstate Commerce Act, § 1(3):

"The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Act of Feb. 4, 1887, 24 Stat. 379, c. 104, as amended by Act of June 29, 1906, 34 Stat. 584, c. 3591; by Act of June 18, 1910, 36 Stat. 545.

c. 309; by Act of Feb. 28, 1920, 41 Stat. 474, c. 91, and by Act of June 19, 1934, 48 Stat. 1102, c. 652; 49 U. S. C. § 1(3).

Car Service Amendment of 1917,
Interstate Commerce Act, § 1(10), (11), (13) and (14):

"(10) The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

* * * * * * *

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, estab-

lish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this part, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices." Act of May 29, 1917, 40 Stat. 101, c. 23, as amended by Act of Feb. 28, 1920, 41 Stat. 476, c. 91; 49 U. S. C. § 1(10), (11), (13) and (14).

Interstate Commerce Act, § 6(1):

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any

part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." Act of Feb. 4, 1887, 24 Stat. 380, c. 104, as amended by Act of Mar. 2, 1889, 25 Stat. 855, c. 382, by Act of June 29, 1906, 34 Stat. 586, c. 3591, and by Act of Feb. 28, 1920, 41 Stat. 483, c. 91; 49 U. S. C. § 6(1).

Hepburn Amendment,

Interstate Commerce Act, § 15(13):

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U. S. C. § 15(13).